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No. 99-

IN THE

Supreme Court of the United States

ELAINE A. SCARFO,

Petitioner,

v.

VICTOR GINSBERG, DBG 94, INC., DBG 95, INC. and DBG 96, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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88 pp

QUESTION PRESENTED FOR REVIEW

Should material issues of fact concerning whether an employer has the requisite number of employees to qualify as an "employer" under federal anti-discrimination laws be resolved by the court, as an issue of subject matter jurisdiction which deprives the parties of the right to trial by jury on those issues, or by the jury, as an element of the cause of action.

PARTIES TO THE PROCEEDING

Other than the parties listed in the caption of this case, there were no other parties to the proceeding before the Eleventh Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Elaine A. Scarfo, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit which affirmed the dismissal of Petitioner's claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1997) for lack of subject matter jurisdiction. Scarfo's Petition for Rehearing *En Banc* was denied on September 13, 1999. (App. F).

OPINIONS OF THE COURT BELOW

The written opinion of the Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit"), affirming the District Court's dismissal of Petitioner's claims for lack of subject matter jurisdiction, is reported at *Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999). (App. A). The Eleventh Circuit denied Petitioner's timely request for rehearing *en banc* on September 13, 1999. (App. F).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 14, 1999. (App. A). Petitioner's Petition for Rehearing *En Banc* was denied on September 13, 1999. (App. F).

This Court has jurisdiction to issue the requested Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

Jurisdiction in the court of first instance, the United States District Court for the Southern District of Florida, was invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(F)(3).

STATUTORY PROVISIONS AND RULES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1997) provides, in relevant part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any

agent of such person . . .

The Civil Rights Act of 1991, 42 U.S.C. § 1981a(c) (1997) provides, in relevant part:

> **Jury Trial.** If a complaining party seeks compensatory or punitive damages under this section — (1) any party may demand a trial by jury . . .

STATEMENT OF THE CASE

A. Proceedings in the District Court

On October 26, 1993, Petitioner Elaine A. Scarfo filed her complaint against Respondents, Victor Ginsberg, DBG 94, Inc., DBG 95, Inc. and DBG 96, Inc., alleging that she had been unlawfully sexually harassed and subjected to retaliatory discharge. Federal jurisdiction in the United States District Court for the Southern District of Florida was invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1997) and 28 U.S.C. § 1331. Petitioner requested a trial by jury on all claims so triable.

On January 23, 1995, Respondents moved for summary

judgment, arguing in part that the district court lacked subject matter jurisdiction over Scarfo's Title VII claims because her "employer" did not employ fifteen or more employees for at least twenty weeks for the relevant years, as required by Title VII, 42 U.S.C. §2000e(b). (App. A, at 3a) (hereinafter "'fifteen employee' question"). Scarfo opposed the motion, arguing that sufficient evidence existed in the record to create genuine issues of material fact as to whether, for at least twenty weeks during the relevant year (1992), her employer had fifteen or more employees. (App. A, at 3a). In so arguing, Scarfo maintained that Respondent Victor Ginsberg owned and operated a number of corporations, Respondents DBG 94, Inc., DBG 95, Inc., DBG 96, Inc., and related corporations, Dr. Build, Inc., Dreamline Cabinet Systems, Inc. and Galaxy Frame, Inc., which should be grouped together as a "single employer" for Title VII purposes. (*Id.*). Scarfo also argued that a genuine issue of material fact existed as to whether Victor Ginsberg could properly be considered an "employee" rather than "owner" for

purposes of meeting the "fifteen employee" requirement. (*Id.* at 4a).

On November 9, 1995, the magistrate judge issued a Report and Recommendation recommending that Respondents' motion for summary judgment be denied. (App. D). On January 31, 1996, the district court adopted the Report and Recommendation in its entirety, including the magistrate judge's finding that "there are genuine issues of material fact in dispute preventing summary judgment in Defendants' favor on the [subject matter] jurisdictional issue." (App. E; App. D., at 44a.).

On February 21, 1996, however, the district court granted Respondents' motion to continue the trial on the ground that the determination of whether Respondents are employers under Title VII was a question of subject matter jurisdiction which the court, not the jury, should decide. (App. A, at 4a). The district court referred the matter back to the magistrate judge to hold an evidentiary hearing, to weigh the evidence and

make credibility findings, and to issue a second Report and Recommendation on the issue of whether subject matter jurisdiction existed under Title VII. (App. A, at 3a-4a).

On December 2, 1996, following five days of evidentiary hearings (which took place over the course of five months), the magistrate judge issued a second Report and Recommendation, recommending that the district court dismiss the case for lack of subject matter jurisdiction. The magistrate judge found that — "despite conflicting evidence" — certain corporations should be joined as a single employer, but rejected the inclusion of one of the companies based on a finding that its "business operations were *significantly less integrated* with the other" companies. (App. A, at 4a; App. C, at 32a) (emphasis added). Moreover, the magistrate judge "determined the [Respondent] Victor Ginsberg was not an employee" for the purposes of determining the jurisdictional number of employees, based on a finding that Ginsberg's activities were those of an owner rather than an employee. (App. C, at 32a).

Over Scarfo's objections, on June 17, 1997, the district court issued an Order of Dismissal in which it affirmed the magistrate judge's second Report and Recommendation and dismissed Petitioner's Title VII claims for lack of subject-matter jurisdiction. (App. B).

B. Disposition by The Court of Appeals For The Eleventh Circuit

1. Majority Decision

Scarfo timely appealed the district court's Order of Dismissal for lack of subject matter jurisdiction to the United States Court of Appeals for the Eleventh Circuit. On May 14, 1999, the Eleventh Circuit affirmed the dismissal. Because the appellate court erroneously held that the "fifteen employee" question was jurisdictional, it concluded that factual disputes should be decided by the district court and not a jury. (App. A).

The Eleventh Circuit rejected Scarfo's argument that the factual determinations of both the "fifteen employee" issue and whether Ginsberg was an "employee" implicated elements of

the Title VII causes of action and thus required resolution by a jury of the disputed facts. (App. A, at 8a).

2. Dissenting Opinion

Judge Barkett's dissenting opinion reasoned:

> [I]n order to determine if the defendant qualifies as an employer and consequently whether Title VII will even apply, we must also look to Title VII's definitional section, in this case 42 U.S.C. §2000e, which defines 'employer' for purposes of the statute. Because the language of Title VII thus provides 'the basis for both the subject matter jurisdiction...and the...substantive claim for relief,' the elements of the claim are intertwined with the jurisdictional question.

(App. A, at 17a)[footnotes and citations omitted]. Judge Barkett concluded that the "district court, therefore, erred in dismissing the case based on its own evaluation of the evidence, and should have sent the cause to the jury for decision . . ." (App. A, at 19a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review the Eleventh Circuit's erroneous decision that Title VII's "fifteen employee" requirement is jurisdictional rather than an element of Petitioner's claim for relief because: (1) the decision directly conflicts with the decisions of other courts of appeals; (2) the decision conflicts with this Court's well-established distinction between subject matter jurisdiction and claims for relief, and; (3) the decision unlawfully deprives Title VII litigants of their statutory and constitutional right to trial by jury on disputed questions of fact.

This Petition challenges the Eleventh Circuit's erroneous transformation of an element of a plaintiff's Title VII cause of action into an inquiry about the subject matter jurisdiction of the district court. Specifically, this Petition challenges the Eleventh Circuit's holding that, because the question of whether an employer employs the requisite number

of employees under Title VII is jurisdictional in nature, a district court may weigh disputed fact-intensive evidence and make credibility findings concerning whether certain individuals and entities can be counted as "employees" to meet the Title VII definitional requirement. These challenges raise an important question of law, highlight the existence of a conflict with the law of this Court and the law of other circuits, and result in significant implications for courts trying and litigants prosecuting employment-related civil rights claims, including the derogation of a Title VII litigant's right to trial by jury. This Petition, therefore, warrants review by this Court.

A.
AN IMPORTANT CONFLICT EXISTS AMONG U.S. COURTS OF APPEALS

Scarfo v. Ginsberg, 175 F.3d 957 (11th Cir. 1999), perpetuates a substantial conflict among the courts of appeals which implicates federal court subject matter jurisdiction and the right to trial by jury under Title VII — perhaps one of the most litigated civil rights statutes. The passage of the Civil

Rights Act of 1991, which authorized compensatory and punitive damages in Title VII cases and created a statutory and constitutional right to jury trial, magnifies the significance of this conflict. *See* 42 U.S.C. § 1981a(c) (1997); *Curtis v. Loether*, 415 U.S. 189, 191-194 (1974) (the Seventh Amendment guarantees a private litigant's constitutional right to trial by jury when a federal statute authorizes compensatory and punitive damages). Accordingly, the *Scarfo* error operates to deprive Title VII litigants of their statutory and constitutional right to trial by jury on central questions of fact.

Scarfo is consistent with decisions of the Fifth and Sixth Circuits which also misconstrue the "fifteen employee" question as dispositive of the case on subject matter jurisdiction grounds. *See Greenlees v. Eidenmuller Enterprises, Inc.*, 32 F.3d 197 (5th Cir. 1994); *Womble v. Bhangu*, 864 F.2d 1212 (5th Cir. 1989); *Dumas v. Town of Mount Vernon, Alabama*, 612 F.2d 974 (5th Cir. 1980); *Whaler v. Melville Corp.*, 793 F.2d 1294 (6th Cir. 1986); *Armbruster v. Quinn*, 711 F.2d 1332 (6th

Cir. 1983). *See also Hukill v. Auto Care, Inc.*, 192 F.3d 417 (4th Cir. 1999) (court of appeals weighed issues of material fact to conclude that corporations could not be joined as an "integrated employer" in an action under the Family and Medical Leave Act).

Recognizing the error of that rule, the Seventh and District of Columbia Circuits have properly concluded that the "fifteen employee" question is merits-related and that disputed issues of fact are to be resolved by a jury as fact-finder. *See Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998), *abrogated on other grounds by Papa v. Katy Indus. Inc.*, 166 F.3d 937, 939-40 (7th Cir. 1999), *cert. denied*,(U.S. Nov. 29, 1999) (No. 99-284); *E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623 (D.C. Cir. 1997).

Consequently, in the Seventh and District of Columbia Circuits, Title VII plaintiffs litigating factual disputes concerning the "fifteen employee" requirement try those cases to a jury, but are wrongly deprived of that right in the Eleventh

Circuit under *Scarfo*.

B.
THE *SCARFO* RULE CONFLICTS WITH DECISIONS OF THIS COURT

The *Scarfo* rule transforms Title VII's "fifteen employee" question into an inquiry about the judicial power of federal courts, disregarding this Court's clear instructions in *Bell v. Hood*, 327 U.S. 678 (1946) and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

As first articulated by this Court in *Bell* and recently re-stated in *Steel*, "'[j]urisdiction [under the federal question statute] is not defeated by the possibility that the averments, upon close examination, might be determined not to state a cause of action.'" *Steel*, 523 U.S. at 89 (quoting *Bell*, 327 U.S. at 682). Rather, "[i]t is firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e. the court's statutory or constitutional power to adjudicate the case." *Steel*, 523 U.S. at 89. Instead, "[d]ismissal for lack of subject-matter jurisdiction

because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel*, 523 U.S. at 89, (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). When a complaint seeks "recovery under the Constitution or the laws of the United States, the federal court . . . *must* entertain the suit." *Bell v. Hood*, 327 U.S. at 681-82 (emphasis added).

Applying the rationale in *Steel*, the Seventh Circuit determined that the issue concerning the sufficiency of the number of employees for Title VII coverage is not jurisdictional. *See Sharpe v. Jefferson Distributing Co.*, 148 F.3d 676, 677 (7th Cir. 1998). The *Sharpe* Court stated that when the plaintiff:

> presents a non-frivolous claim under federal law: no more is necessary for subject-matter jurisdiction. A plaintiff's inability to demonstrate that the defendant has 15 employees is just like any other failure to meet

> a statutory requirement. There is a gulf between defeat on the merits and a lack of jurisdiction.

Sharpe, 148 F.3d at 677, *citing Steel*, 523 U.S. 89-93. *See also Papa v. Katy*, 166 F.3d at 943 (Posner, C.J.) (stating district court's treatment of employee status under ADEA as jurisdictional "was wrong; the issue is not jurisdictional.").

Similarly, the District of Columbia Circuit applied *Bell v. Hood* and held that the question of whether the defendant had "enough employees to be covered under the ADA does not affect the jurisdiction of the district court." *E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623-625 (D.C. Cir. 1997). The D.C. Circuit reasoned that "because the claim arises under the laws of the United States and is neither 'immaterial and made solely for the purpose of obtaining jurisdiction' nor 'wholly insubstantial and frivolous,'" the district court had jurisdiction. *St. Francis*, 117 F.3d at 623-625 (quoting *Bell v. Hood*, 327 U.S. at 682-83).

The *Scarfo* court disregarded this Court's rulings in *Bell*

and *Steel* by concluding that factual disputes about the "fifteen employee" inquiry were to be resolved by the court as an issue of subject matter jurisdiction. Since Scarfo's Title VII claims were genuinely at issue, the courts below possessed jurisdiction under this Court's rulings in *Bell* and *Steel*, and should have reached the merits of her claims. *See Steel*, 523 U.S. at 89.

C.
THE RESOLUTION OF THIS CONFLICT HAS IMPORTANT CONSEQUENCES IN EMPLOYMENT DISCRIMINATION LITIGATION

1. The Jurisdictional Rule Abrogates The Right to Trial by Jury

The *Scarfo* decision contradicts the "federal policy favoring jury decisions on disputed fact questions." *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 538 (1958). This Court has previously stated:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence — if not the

> command — of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd, 356 U.S. at 537. Rather than "administering justice to litigants," the *Scarfo* rule circumvents the legislative intent of Congress in passing § 1981a(c) of the Civil Rights Act of 1991 to provide a right to trial by jury and improperly avoids the "greater restrictions on the district court's discretion" imposed by Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure. *See Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

The 1991 Civil Rights Act established a statutory right to trial by jury in Title VII cases. 42 U.S.C. § 1981a(c)(1997). Consequently, because compensatory and punitive damages are authorized by this federal statute, the Seventh Amendment separately guarantees the private Title VII litigant's right to trial by jury. *See Curtis v. Loether*, 415 U.S. 189, 194 n.7 (1974). It is axiomatic that a mischaracterization of factual disputes as jurisdictional cannot dissolve the statutory and constitutional

right to trial by jury on disputed issues of fact. This is precisely the error of the Eleventh Circuit in this case.

2. *Scarfo* Causes Federal Court Inefficiency

The *Scarfo* decision's practical implications also strike at the heart of federal court efficiency. Under the *Scarfo* approach, courts must hold mini-trials to take evidence and hear testimony on the "fifteen employee" issue. Indeed, in this case, the district court held five days of evidentiary hearings — over the course of five months — to determine that it lacked subject matter jurisdiction over Scarfo's claims. The first hearing began two years and seven months after this litigation began and, significantly, after the district court had already denied Respondents' first Motion for Summary Judgment on the same grounds.

Not only does the *Scarfo* decision arbitrarily transform a purely factual question into litigation on the subject matter jurisdiction of the district court, but it also squarely places the onus on the court to raise the issue of subject matter jurisdiction

sua sponte. *See Steel*, 523 U.S. at 92-93 ("[T]hose statutory arguments, since they are 'jurisdictional,' would have to be considered by this Court even though not raised earlier in the litigation - indeed, this Court would have to raise them *sua sponte*."). The absurdity of this result has been recognized by the Seventh Circuit: "[s]urely the number of employees is not the sort of question a court (including appellate court) must raise on its own, which a 'jurisdictional' characterization would entail." *Sharpe*, 148 F.3d at 677-78.

3. Circuit Courts and District Courts Within the Circuits are Confused by Competing Rationales

Bell v. Hood, 327 U.S. 678 (1946) and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) establish clear rules for determining which questions implicate the subject matter jurisdiction of federal courts. By departing from these well-settled rules, *Scarfo* has caused confusion throughout the federal court system. In fact, the *Scarfo* rule's effects have not been limited to Title VII. What began as an aberration of

Title VII law has metastasized into erroneous rulings under other federal anti-discrimination statutes. *See, e.g., Hukill v. Auto Care, Inc.*, 192 F.3d 437 (4th Cir. 1999) (court of appeals weighed material issues of fact and concluded that corporations should not be combined as an "integrated employer" in action under the Family and Medical Leave Act).

Moreover, recent case law demonstrates that circuit courts which have not yet squarely addressed the issue presented by this Petition have suggested competing resolutions. *Compare Zinn v. McKune*, 143 F.3d 1353, 1356 (10th Cir. 1998) (plaintiff "must establish, for jurisdictional purposes, that the [defendant] falls within the statutory definition of 'employer' provided in 42 U.S.C. § 2000e(b)") *with Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069 (10th Cir. 1998) (suggesting that plaintiff's proof that their "employer" fits Title VII's statutory definition is another component of the plaintiff's *prima facie* case).

District courts within these circuits struggle with competing analyses. *See Morris-Eberhart v. J.G. Mathena & Assoc., Inc.*, 186 F.R.D. 619 (D. Kan. 1999) (discussing Tenth Circuit precedent and holding that proof of employer's definitional status in a Title VII case does not affect subject matter jurisdiction); *Saxon v. Orthodontics*, No. 98-2401, 1999 U.S. Dist. LEXIS 5820 (D. Kan. Mar. 31, 1999) (same).

Additionally, the rule in *Scarfo* produces an absurd result which allows courts to treat similar Title VII coverage questions differently. Significantly, factual issues surrounding the statutory definition of "employee" are routinely treated as merits-related, rather than implicating subject matter jurisdiction. *See, e.g., Clark v. Tarrant County, Texas*, 798 F.2d 736, 742 (5th Cir.), *reh'g denied*, 802 F.2d 455 (1986) (determination of "employee" status under Title VII is intertwined with the merits of the Title VII claim); *Miller v. Lifestyle Creations,* Case No. 90-16822, 1993 U.S.App. LEXIS 13453 (9th Cir., May 24, 1993) ("It is axiomatic that a court

cannot dismiss a case on the merits where there is a genuine issue of material fact" concerning whether individuals are "employees" or "independent contractors"); *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987) ("[W]hether a plaintiff qualifies as an 'employee' under the federal anti-discrimination statutes is both a jurisdictional question and an aspect of the substantive claim in [the] discrimination action.").

CONCLUSION

Petitioner respectfully requests that this Court grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. Because the decision below plainly conflicts with the prior decisions of this Court, Petitioner respectfully requests that the Court summarily reverse and remand this case with instructions to the Eleventh Circuit to vacate the district court judgment and remand for trial by jury.

RESPECTFULLY SUBMITTED,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 14, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5244

D.C. Docket No. 93-6918-CV-WDF

ELAINE A. SCARFO,

Plaintiff-Appellant,
Cross-Appellee,

versus

VICTOR GINSBERG, DBG 94, INC., et al.,
Florida Corporations,

Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(May 14, 1999)

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and RONEY, Senior Circuit Judge.

HATCHETT, Chief Judge:

Appendix A

Elaine Scarfo appeals the district court's grant of summary judgment to the appellees on her claims of sexual harassment and employee discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et. seq* (1997). Scarfo contends that the district court erred in concluding that it lacked subject matter jurisdiction over her Title VII claims. We affirm.

I. FACTS

Victor Ginsberg owned or partially owned the corporate appellees DBG 94, Inc.; DBG 95, Inc.; DBG 96, Inc.; and a number of corporations not named in this lawsuit, including Dr. Build, Inc. (Dr. Build); Dreamline Cabinet Systems, Inc. (Dreamline) and Galaxy Frame, Inc (Galaxy Frame). None of these corporations employed 15 or more employees for at least 20 weeks in 1992. Scarfo was a secretary and receptionist for DBG 95, Dr. Build and Dream Line. She alleged that throughout her employment, Ginsberg subjected her to unwelcome sexually offensive conduct.

According to Scarfo, two or more of the above corporations combined constituted her employer for Title VII purposes. Moreover, Scarfo contends that Ginsberg and various part-time personnel were employees pursuant to Title VII jurisdiction. 42 U.S.C. § 2000e(b).

II. PROCEDURAL HISTORY

On October 26, 1993, Scarfo filed a complaint against Ginsberg, DBG 94, Inc.; DBG 95, Inc.; and DBG 96, Inc., (the appellees) alleging that Ginsberg: (1) discriminated

against her in her employment on the basis of her sex; (2) subjected her to sexual harassment and created a hostile work environment; and (3) discharged her in retaliation, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* Scarfo also brought Florida state law claims for battery, intentional infliction of emotional distress and invasion of privacy.

On January 23, 1995, the appellees moved for summary judgment, contending that the district court lacked subject matter jurisdiction over Scarfo's Title VII claims. Scarfo opposed the appellees' motions, arguing that sufficient evidence existed in the record to create an issue of material fact as to whether Ginsberg had employed 15 or more employees for 20 weeks during 1992, the relevant year.

Title VII defines "employer" as "a person engaged in an industry affecting commerce who had fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person." 42 U.S.C. § 2003(b) (1998).

Scarfo argues that Ginsberg owned and operated a number of corporations that the court should group together as a single employer, or if viewed separately, as her joint employer, for Title VII purposes. Scarfo also argues that the "employer" for determining Title VII jurisdiction in this case consists of the combination of the appellees DBG 94, Inc.; DBG 95, Inc.; DBG 96, Inc.; and related corporations, Dr. Build; Dreamline and Galaxy Frame.

A magistrate judge issued a report recommending the denial of the appellees' summary judgment motions, finding

that genuine issues of material fact existed regarding subject matter jurisdiction. The district court issued an order adopting the magistrate judge's report and recommendation and set the case for trial.

On February 2, 1996, the appellees filed a motion to continue the trial on the ground that the determination of whether they were employers under Title VII was a subject matter jurisdiction issue that a court should decide rather than a jury. At the pretrial conference, the district court granted the appellees' motion, referred the matter to the magistrate judge, and directed the magistrate judge to hold an evidentiary hearing and to file a report and recommendation on the issue of whether subject matter jurisdiction existed under Title VII.

On December 2, 1996, the magistrate judge issued a report recommending that the district court dismiss the case for lack of subject matter jurisdiction. The magistrate judge based the recommendation on the finding that certain corporations should be joined as a single employer, but that Galaxy Frame should be excluded in the single employer framework because its "business operations were significantly less integrated with the other" companies. Moreover, the magistrate judge determined that Ginsberg was not an employee for purposes of determining the number of employees, finding that Ginsberg's activities were those of an owner rather than an employee. The magistrate judge then recommended that the district court dismiss Scarfo's lawsuit.

After Scarfo filed objections to the magistrate judge's report and recommendation, on June 17, 1997, after the

parties had briefed the issue and had oral argument, the district court issued an order of dismissal. In its order of dismissal, the district court stated:

> The Court has reviewed all of the facts the parties presented and applied a Rule 56 summary judgment standard in deciding the two dispositive jurisdictional issues: (1) the defendant owner Victor Ginsberg was not an employee of the defendant corporations. . . . and (2) Galaxy Frame, Inc. a corporation which the plaintiff alleges as related to the named defendant corporations in pleading jurisdiction under Title VII, was not so highly interrelated to the other companies that they could be deemed a "single employer."

The district court also dismissed the state law claims, without prejudice to refiling in state court. Scarfo filed this appeal, and the appellees cross-appealed.

III. ISSUES

The issues we discuss are: (1) whether the district court had subject matter jurisdiction over Scarfo's Title VII claims under the "single employer" doctrine; and (2) whether the district court abused its discretion in dismissing Scarfo's state law claims.

IV. STANDARD OF REVIEW

We review the district court's findings of jurisdictional facts for clear error. *See Eaton v. Dorchester Development,*

Inc., 692 F.2d 727, 732 (11th Cir. 1982). We review the district court's dismissal of the state claims for abuse of discretion. *See L.A. Draper & Son v. Wheelabrator - Frye, Inc.*, 735 F.2d 414, 420 (11th Cir. 1984).

V. DISCUSSION

A. Single Employer

The appellees contend, for the first time on appeal, that the district court lacked authority to consider whether it had subject matter jurisdiction under the "single employer" doctrine because only one of the four corporations that Scarfo argues collectively constitute a "single employer" was named as a defendant. Scarfo contends that the appellees' contention should not be addressed because they have raised this issue for the first time on appeal. Under the law of this circuit, however, parties cannot waive subject matter jurisdiction, and we may consider subject matter jurisdiction claims at any time during litigation. *See Latin American Property & Casualty Ins. Co. v. Hi-Lift Marina, Inc.*, 887 F.2d 1477, 1479 (11th Cir. 1989). Therefore, we address the jurisdiction issue.

Attacks on subject matter jurisdiction come in two forms: (1) facial attacks, and (2) factual attacks. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)).

Facial attacks on a complaint "require the court merely to look and see if the plaintiff has sufficiently alleged a basis

of subject matter jurisdiction, and the allegations in [plaintiff's] complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). Factual attacks challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence*, 919 F.2d at 1529. This circuit has explained that in a factual attack, the presumption of truthfulness afforded a plaintiff under Federal Rule of Civil Procedure 12(b)(6) does not attach, and the court is free to weigh the evidence, stating:

> [in a factual attack upon subject matter jurisdiction] the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction — it's [sic] very power to hear the case — there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Lawrence, 919 F.2d at 1529 (quoting *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981)).

Scarfo argues that under *Garcia v. Copenhaver*, the jury, as fact-finder, should have determined the "single employer" issues for Title VII purposes. 104 F.3d 1256 (11th Cir. 1997). *Garcia*'s reasoning, however, is inapposite to this case.

Appendix A

The issue in *Garcia* was whether the court or the jury should determine if the plaintiff, as well as other persons similarly situated, were "employees" or "independent contractors" under the Age Discrimination in Employment Act (ADEA), and thus comprised the 20 employees required to elevate the defendant to employer status necessary to confer subject matter jurisdiction on the court. The *Garcia* court, noting "the unusual factual scenario," held that whether the plaintiff was an "employee" was an element of the plaintiff's ADEA claim and, therefore, any issues of material fact were for the jury. *Garcia*, 104 F.3d at 1267.[1]

In contrast, the appellees' status as "employers" in this case does not implicate an element of the Title VII cause of action. In this case, the appellees contend that they are not a "single employer" within the meaning of Title VII. *See* 42 U.S.C. § 2000e(b). Whether the appellees constitute an "employer" within the definition of Title VII is a threshold jurisdictional issue. *Virgo v. Riviera Beach Associates, Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994). Unless the appellees constitute an employer "who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year," Title VII is inapplicable, and the district court lacks subject matter jurisdiction over Scarfo's claims. *See* 42 U.S.C. § 2000e(b).[2]

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1. In Garcia, the "employer" and "employee" issues were intertwined because the ADEA's definitions of "employer" and "employee" overlapped. 104 F.3d at 1265 n.9.

2. The district court found that DBG 95, Dr. Build and Dreamline Cabinets constituted a single employer in 1992 for Title

(Cont'd)

Appendix A

Whether the appellees constitute an employer under Title VII does not implicate an element of the cause of action. *See Virgo*, 30 F.3d at 1359. Rather, whether appellees constitute an employer addresses whether Title VII applies in this case. Thus, appellees' motions to dismiss for lack of subject matter jurisdiction are properly considered under Federal Rule of Civil Procedure 12(b)(1). When faced with factual disputes regarding subject matter jurisdiction, the district court serves as the fact-finder and may weigh the evidence, provided that the challenge to subject matter jurisdiction does not implicate an element of the cause of action. Fed. R. Civ. P. 12(b)(1) (1998). Because subject matter jurisdiction addresses the power of a court to hear a case, a jury does not resolve factual issues regarding subject matter jurisdiction. Instead, that duty is for the court. This determination is different from the intertwined employer and employee issues *Garcia* considered. In this case, before a jury could reach the issue of whether 15 or more "employees" worked for the appellees, the district court needed to determine which of the companies it could use for counting purposes. In other words, in *Garcia*, where the court clearly had jurisdiction if the plaintiff proved "employee" status rather than "independent contractor" status, the issue of whether plaintiff was in fact an "employee" was an element of the cause of action. In this case, whether the corporations constitute an "employer" concerns only jurisdiction. Issues regarding jurisdiction are for the court.

(Cont'd)
VII purposes; however it found that Galaxy Frame should not be combined with these three other corporations as Scarfo's employer during that year. The district court determined that the evidence did not establish a high degree of interrelatedness between Galaxy Frame, DBG 95, Dr. Build and Dreamline Cabinets.

B. State Law Claims

Scarfo contends that even if the district court properly dismissed her Title VII claims for lack of subject matter jurisdiction, it had authority to retain jurisdiction over her state law claims. The appellees contend that once the district court dismissed the federal claims, it had no discretion to retain jurisdiction.

Title 28 U.S.C. § 1367(a) provides that, in any action in which the district courts "have original jurisdiction," they may exercise supplemental jurisdiction over state law claims related to the federal claim. The federal courts of appeals, however, have uniformly held that once the district court determines that subject matter jurisdiction over a plaintiff's federal claims does not exist, courts must dismiss a plaintiff's state law claims. *See Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1255 (6th Cir. 1996); *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 329 (9th Cir. 1996); *Toste Farm Corp. v. Hadbury, Inc.*, 70 F.3d 640, 646 n.11 (1st Cir. 1995); *Womble v. Bhangu*, 864 F.2d 1212 (5th Cir. 1989) (holding that where the district court determines that the appellee was not an "employer" within the meaning of Title VII and dismisses the Title VII claim for lack of subject matter jurisdiction, the district court must dismiss the state law claims). Therefore, the district court did not abuse its discretion in dismissing Scarfo's state law claims.

VI. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment.

AFFIRMED.

Appendix A

BARKETT, Circuit Judge, dissenting:

I agree that pure questions of law relating to subject matter jurisdiction are decided by the judge. However, when the existence of subject matter jurisdiction turns on the resolution of disputed facts, depending on the substance of the dispute, it may be province of the jury to decide the question. If the disputed facts bear no relation to the elements of the cause of action, the judge is the fact finder. If, on the other hand, the disputed facts relating to jurisdiction are intertwined with the facts relating to the elements of the cause of action, the disputed questions of fact are for the jury to decide.

In this case we must decide if the disputed facts regarding whether the defendant is an "employer" for purposes of Title VII liability involve only subject matter jurisdiction or rather involve "a substantive element of [a Title VII] claim[,] intertwined with the question of [subject matter] jurisdiction," thus becoming a matter for the jury. *Garcia v. Copenhaver*, 104 F.3d 1256, 1264 (11th Cir. 1997). In *Garcia*, this circuit addressed this very same question in the context of the ADEA and concluded that the disputed issue represented an "attack on jurisdiction [which] also implicates the merits of plaintiff's cause of action" and thus was a question for the jury *Id.* at 1261. I believe *Garcia*'s reasoning applies to this case. Therefore, I would reverse the district court's dismissal and remand to allow a jury to decide Scarfo's claim on the merits.

To support its position, the majority quotes from *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990),

suggesting that *Lawrence* holds that, where a party mounts a factual challenge to subject matter jurisdiction, "'the trial court is free to weigh the evidence[,] . . . [and] evaluat[e] for itself the merits of jurisdictional claims.'" *Id.* (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). This statement, however, comprises only part of the holding in *Lawrence*. The court goes on to state clearly that when a defendant's factual attack on subject matter jurisdiction "'also implicates an element of the cause of action[, t]he proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case [by applying the Rule 12(b)(6) or Rule 56 summary judgment standard to the facts alleged]. . . ,'" *id.* (quoting *Williamson*, 645 F.2d at 415) — that is, to take the facts alleged in the light most favorable to the non-moving party, and, if there are disputed material facts, to send the case to the jury for decision.

The key inquiry here, therefore, is whether Ginsberg's challenge to the court's jurisdiction on the ground that he does not meet the statutory definition of an employer under Title VII *also* implicates an element of Scarfo's cause of action.[1] The majority, implicitly recognizing that this is so,

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1. The majority's reliance on *Virgo v. Riviera Beach Associates, Ltd.*, 30 F.3d 1350 (11th Cir. 1994), is thus to no avail. *Virgo* may stand for the proposition that the question whether a defendant is an "employer" for Title VII purposes is a jurisdictional issue, but it does not foreclose the possibility that this inquiry also implicates an element of a plaintiff's cause of action under Title VII. In fact, as *Garcia* suggests, *Virgo*'s emphasis on the factual nature of the question of a defendant's "employer" status, combined with the fact that, when *Virgo* was decided, "Title VII did not permit

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asserts without explanation that "the appellee's status as 'employers' in this case does not implicate an element of the Title VII cause of action." *Scarfo v. Ginsberg*, __ F.3d __. *Garcia*, however, holds the exact opposite.

The majority attempts to distinguish *Garcia* from the case at hand by suggesting that, under the facts of *Garcia*, the question of whether Copenhaver was an "employer" for Title VII purposes was "intertwined" with the question of whether Garcia was an "employee." In *Garcia*, however, we held that where a defendant challenges the court's subject matter jurisdiction by arguing that he is not a statutory employer, factual questions must be resolved by the jury, not the court. This holding is squarely applicable here. The fact that in *Garcia*, the question of the plaintiff's "employee" status was also "intertwined" with that of the defendant's "employer" status was wholly irrelevant to the holding in that case and is irrelevant to the distinct inquiry we face here, which is whether Ginsberg's challenge to the court's jurisdiction is itself "intertwined," not with an additional factual question, but with an element of the cause of action. And as the *Garcia* analysis makes clear, *both* the defendant's employer status and the plaintiff's employee status for purposes of Title VII are substantive elements of the plaintiff's cause of action "intertwined" with the question of jurisdiction.

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trials by jury," *Garcia*, 104 F.2d at 1264, actually supports a conclusion contrary to the majority's bald assertion that "[w]hether the appellees constitute an 'employer' within the definition of Title VII is a threshold jurisdictional issue." *Scarfo v. Ginsberg*, __ F.3d at __ (citing *Virgo*, 30 F.3d at 1359).

Appendix A

In *Garcia*, an emergency room doctor contracted with Copenhaver/Bell to work in one of its client hospitals. *Garcia*, 104 F.3d at 1258. When Garcia sued under the ADEA, the Magistrate precluded a jury determination by dismissing the case for lack of subject matter jurisdiction. Based on its finding that many of the physicians under contract with Copenhaver were independent contractors, the Magistrate concluded that Copenhaver employed fewer than twenty employees and was therefore not an "employer" within the meaning of the ADEA. *See id.* at 1260.[2]

This is precisely what the district court did here. Unlike the majority, however, this court in *Garcia reversed* the dismissal, holding that the Magistrate erred in not sending the case to the jury. The *Garcia* court characterized the case as involving a "factual" attack on subject matter jurisdiction, under which "a court's power to make findings of facts and to weigh the evidence *depends on whether the factual attack on jurisdiction also implicates the merits of [the] plaintiff's cause of action*." *Id.* at 1261 (emphasis added).[3] To make

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2. *See also* 29 U.S.C. § 630(b) (defining an "employer"for purposes of the ADEA as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

3. *Cf. Garcia*, 104 F.3d at 1261 (explaining that "facial attacks," in contrast to "factual attacks," "'require[ ] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.'") (quoting *Lawrence*, 919 F.2d at 1529).

this determination, the court examined both whether Copenhaver was an "employer" and Garcia an "employee" for purposes of the ADEA. Treating each question separately, the court concluded that *each question* "[was] a substantive element of an ADEA claim and intertwined with the question of jurisdiction." *Id.* at 1264. It reached this conclusion on the basis that "[t]he question of jurisdiction and the merits of an action will be considered intertwined where . . . 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'" *Id.* at 1262 (quoting *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139-40 (9th Cir. 1983)).

Looking to see if the statute provided the basis for both the jurisdiction and the substantive claim, the *Garcia* court noted that "a plaintiff can only recover if he is able to prove an 'employer' discriminated against him/her on the basis of age."[4] *Id.* But "in order to determine if a defendant qualifies as an 'employer' and, consequently, whether ADEA will even apply," the court found it necessary to "turn to the ADEA's definition section," *id.* at 1263, which defines an "employer" for purposes of the statute.[5] Because "the section

4. Specifically, the court found that, under § 623(a)(1) of the ADEA, "a plaintiff must prove: 1) an employer, 2) failed or refused to hire or to discharge, 3) any individual, 4) with respect to his compensation, terms, conditions, or privileges of employment, 5) because of such individual's age." *Id.* at 1262-63.

5. *See* 29 U.S.C. § 630(b) (defining "employer" in part as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . .").

of ADEA that provides the substantive relief, § 623, is intertwined and dependent on the section of ADEA that defines the scope of the act, § 630,"[6] the court concluded that Copenhaver's jurisdictional challenge implicated the merits of Garcia's claim. In other words, because the language of the ADEA provided "the basis for both the subject matter jurisdiction . . . and the . . . substantive claim for relief," *id.* at 1262, the court found the elements of the claim intertwined with the jurisdictional question.

The court's rationale was based on the fact that a defendant who challenges his or her own status as an employer under the statute is in effect denying that the plaintiff has a claim for statutory relief. Such a challenge goes to one of the elements of the plaintiff's claim, and is thus qualitatively different than other types of jurisdictional challenges which go only to the power of the court to hear the claim at all. *See Williamson v. Tucker*, 645 F.2d 404, 416 (5th Cir. 1981) ("[A]s a general rule a claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action."). Although, in the ordinary case, courts are free to resolve jurisdictional challenges to ADEA claims without the participation of the jury, the same cannot be said of challenges that also go to the merits of the claim. *See Garcia*, 104 F.2d at 1261. Because the court in *Garcia* found that "whether or not one

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6. *Garcia*, 104 F.3d at 1263 ("An analysis of the two sections is circular as the two sections are dependent on one another. For a plaintiff to recover under the act, plaintiff must prove as part of his claim that an 'employer' discriminated against him/her. To prove that a defendant is an 'employer,' a plaintiff must satisfy the definition of 'employer' set forth in § 630(b).").

is an 'employer' is an element of an ADEA claim," it concluded that "the jury, rather than the judge, should decide the disputed question." *Id.* at 1263.[7]

As in *Garcia*, defendant Ginsberg challenged the jurisdiction of the court on the grounds that he did not employ the requisite number of employees to meet the statutory definition of an "employer" under Title VII. As in *Garcia*, Scarfo can only recover if she is able to prove an "employer" discriminated against her with respect to the terms of her employment. And as in *Garcia*, in order to determine if the defendant qualifies as an employer and consequently whether Title VII will even apply, we must also look to Title VII's definitional section, in this case 42 U.S.C. § 2000e, which defines "employer" for purposes of the statute.[8] Because the language of Title VII thus provides "the basis for both the subject matter jurisdiction . . . and the . . . substantive claim for relief," *Garcia*, 104 F.3d at 1262, the elements of the claim are intertwined with the jurisdictional question.[9]

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7. For this reason, it held that the court should have evaluated the defendant's challenge to the court's jurisdiction under the standard of Rule 12(b)(6) or Rule 56.

8. *See* 42 U.S.C. § 2000e(b) (defining "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .").

9. The court in *Garcia* itself noted the identity between the structure of the two statutes, and for this reason drew on the more extensive Title VII cases "for guidance." *Garcia*, 104 F.3d at 1264 ("'As the substantive provisions of the ADEA were derived *in haeca*

(Cont'd)

Appendix A

Our cases hold that if the attack implicates an element of the cause of action, courts are "'to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.'" *Id.* (quoting *Williamson v. Tucker*, 645 F.2d 404, 415 (former 5th Cir. 1981)). In such a case, a district court is to evaluate a defendant's assertion of lack of subject matter jurisdiction as a Rule 12(b)(6) motion or a motion for summary judgment,[10] and send the case to the jury if there are disputed issues of material fact.[11] In this case, although the district court said it was applying the Rule 56 summary judgment standard, it instead weighed the evidence as a fact-finder. But if evidence is to be weighed

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verba from Title VII, as was the statutory definition of "employer," (which relates to the scope of the law's substantive portions), we may look to the constructions of the term in the Title VII . . . context for guidance.'" (quoting *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 820 n.15 (1st Cir. 1991)).

10. Only if the attack does not implicate the merits of the case may the trial court treat the issue as a 12(b)(1) motion to dismiss and "'weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Id.* (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

11. Under this standard, the court takes the facts alleged by the plaintiff as true, and must deny the motion if it finds a genuine issue of material fact. *See Maniccia v. Brown*, 1999 WL 198668, *2 (11th Cir. 1999). On this standard, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1321 (11th Cir. 1999) (internal quotation marks omitted).

when the factual issues implicate both the elements of the cause of action and the court's jurisdiction, this must be done by the jury. Summary judgment thus would have been appropriate only if there were no disputed issues of material fact — and, as the record in this case clearly demonstrates, this was not the case here. The district court therefore erred in dismissing the case based on its own evaluation of the evidence, and should have sent the case to the jury for decision. For the foregoing reasons, I dissent from the majority opinion and would reverse the district court's dismissal of the case on jurisdictional grounds and remand for a trial on the merits of Scarfo's Title VII claim.

Appendix A

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 97-5244

ELAINE A. SCARFO,

Plaintiff-Appellant, Cross-Appellee,

versus

VICTOR GINSBERG, DBG 94, INC.,
et al., Florida Corporation,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and RONEY, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant, cross-appellee pay to defendants-appellees, cross-appellants, the costs on appeal to be taxed by the Clerk of this Court.

BARKETT, Circuit Judge, dissented and filed an opinion.

Entered: May 14, 1999
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: SEP 28 1999

APPENDIX B — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JUNE 17, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 93-6918-CIV-FERGUSON

ELAINE A. SCARFO,

Plaintiff,

vs.

VICTOR GINSBERG, DBG 94, INC., DBG 95, INC., and DBG 96, INC.,

Defendants.

ORDER OF DISMISSAL

THIS CAUSE is before the Court on the plaintiff's objections to Magistrate Judge Ted E. Bandstra's Report and Recommendation that this action for sexual harassment and employment discrimination be dismissed on jurisdictional grounds. The main contention is that *Garcia v. Copenhaver, Bell & Associates, M.D., P.A.*, 104 F. 3d 1235 (11th Cir. 1997), decided after the Report and Recommendation was filed, modifies earlier cases and requires that disputed issues of fact bearing on subject matter jurisdiction which also implicate the merits of a cause of action be submitted to the trier of fact.

Appendix B

The Court has reviewed all of the facts as presented by the parties and applied a Rule 56 summary judgment standard in deciding the two dispositive jurisdictional issues: (1) the defendant owner Victor Ginsberg was not an employee of the defendant corporations. *See Norman v. Levy*, 767 F. Supp 1441, 1446 (N.D. Ill. 1991) (owners are not considered employees within the meaning of Title VII) and (2) Galaxy Frame, Inc. a corporation which the plaintiff alleges as related to the named defendant corporations in pleading jurisdiction under Title VII, was not so highly interrelated to the other companies that they could be deemed a "single employer". *See Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 583-84 (7th Cir. 1993) (two commonly owned corporations did not constitute a single employer where each company had its own records and equipment).

The Magistrate Judge's recommendation that the defendants' Motion for Summary Judgment on the question of subject matter jurisdiction, be **GRANTED**, is **AFFIRMED** in its entirety[1].

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 17th day of June, 1997

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Counsel of Record

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1. The state law claims are DISMISSED without prejudice to refile in the state court. Dismissal of the state claims may be reconsidered, on a timely motion, if the defendants assert and prevail on a statute of limitations defense.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED DECEMBER 2, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-6918-CIV-FERGUSON

ELAINE A. SCARFO,

Plaintiff,

vs.

VICTOR GINSBERG; DBG 94, INC.;
DBG 95, INC; and DBG 96, INC.,
Florida corporations,

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court for a determination of a jurisdictional issue first raised by defendants in their Motion for Summary Judgment, filed on January 23, 1995. Previously, all pretrial motions in this case were referred to the undersigned by the Honorable Wilkie D. Ferguson, Jr., pursuant to 28 U.S.C. § 636(b). Accordingly the undersigned conducted a hearing on Defendants' Motion for Summary Judgment on October 18, 1995, and thereafter submitted a Report and Recommendation, on November 9, 1995, in which the undersigned found factual issues precluding

summary judgment in defendants' favor on the jurisdictional issues. Therefore, the undersigned recommended denial of the motion on the jurisdictional issue. This Court adopted the recommendation by Court order dated January 31, 1996.

On February 21, 1996, the Court again referred the jurisdictional issue to the undersigned for an evidentiary hearing and further Report and Recommendation. This evidentiary hearing was conducted before the undersigned on May 14, June 6 and 7, and September 11 and 12, 1996. Thereafter, the parties submitted proposed findings of fact and conclusions of law addressing the jurisdictional issue on November 12, 1996. Having carefully considering the evidence, the post-hearing submissions by the parties, and applicable law, the undersigned recommends that this action be DISMISSED in its entirety due to this Court's lack of subject matter jurisdiction over this controversy under 42 U.S.C. § 2000e.

INTRODUCTION

This is a sexual harassment and employee discrimination case brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et. seq.*, in which plaintiff, Elaine A. Scarfo, seeks to redress injuries allegedly sustained as a result of employment discrimination and sexual harassment by her employer in 1992. More specifically, plaintiff seeks damages for allegedly being subjected to a hostile work environment and to acts of employment discrimination on the basis of sex in violation of Title VII. In addition, plaintiff seeks damages at common law for battery, intentional infliction of emotional distress,

and invasion of privacy under Florida common law. Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(F)(3), with respect to the federal claims; and pursuant to 28 U.S.C. § 1367© with respect to the state law claims.

Previously, defendants moved for summary judgment on the Title VII claims for lack of subject matter jurisdiction. Specifically, defendants argued that this Court lacks subject matter jurisdiction over the Title VII claims because plaintiff's "employer" did not employ fifteen or more employees for at least twenty weeks for the relevant year, as required for federal jurisdiction under 42 U.S.C. § 2000e. After denying that motion due to facts found in dispute, this Court referred the matter to the undersigned for an evidentiary hearing on the question of jurisdiction. Having completed that hearing, the undersigned now readdresses defendants' motion for summary judgment in terms of the jurisdictional issue raised therein.

ANALYSIS

The preliminary issue raised by defendants' motion for summary judgment is whether this Court has subject matter jurisdiction over plaintiff's Title VII claims. Resolution of this issue hinges on whether defendants and other non-defendant corporations are a single (or joint) "employer" subject to Title VII liability under the Civil Rights Act of 1964. The term "employer" is defined in the Act as

> . . . a person engaged in an industry affecting commerce who has fifteen or more employees for

> each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . .

42 U.S.C. § 2000e(b). The parties agree that the relevant calendar year here is 1992. The parties dispute whether, during that year, defendants, together with other nondefendant corporations identified below, were a Title VII "employer" with fifteen or more employees working each day for twenty or more calendar weeks in 1992.

Addressing the jurisdictional issue, the undersigned begins with certain well recognized principles used in determining this issue in Title VII cases. First, federal courts have recognized that the term "employer" as used in Title VII of the Civil Rights Act is to be liberally construed. *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987); *Trevino v. Celanese Corp.*, 701 F.2d 397, 403 (5th Cir.), *reh. denied*, 707 F.2d 515 (5th Cir. 1983). Two or more separate business entities may constitute a single or joint "employer" for Title VII purposes depending on the relationship of those business entities to each other. The predominant test in determining whether two business entities should be treated as a single or joint employer under § 2000e(b) is to apply the standards promulgated by the National Labor Relations Board ("NLRB"). *McKenzie*, 834 F.2d at 933 (citing cases). These NLRB factors include (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Id.* Courts applying this four-part test in Title VII cases have focused on the second factor. *Trevino*, 701 F.2d at 404 (citing cases). Federal courts

have also held that the showing required to warrant a single employer status has been described as "highly integrated with respect to ownership and operations." *McKenzie, supra* (citing *Fike v. Gold Kist, Inc.*, 514 F.Supp. 722, 726 (N.D. Ala) *aff'd*, 664 F.2d 295 (11th Cir. 1981)).

Applying these principles, the Court is assisted by the stipulation of the parties concerning the employee status of individuals who performed work for the various defendant and non-defendant corporations in 1992. *See* Parties' Joint Statement [Etc.] filed on April 19, 1995. In their joint statement, the parties have agreed that defendant Victor Ginsberg owned or partially owned defendants DBG 94, Inc., DBG 95, Inc., and DBG 96, Inc., as well as a number of unnamed corporations, including Dr. Build, Inc., Dreamline Cabinet Systems, Inc., and Galaxy Frame, Inc. The parties have also agreed that no one of these corporations by itself employed fifteen or more employees for at least twenty weeks in 1992. Thus, plaintiff would have to establish that two or more of these corporations would have to be combined together, thereby constituting a single employer to establish Title VII jurisdiction.[1] Even then, the parties agree that Court would have to determine whether certain persons, including Victor Ginsberg, Dominick Scarfo, and various part-time personnel, should be counted as employees to meet the jurisdictional threshold established by 42 U.S.C. § 2000e(b).

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1. The parties agree that plaintiff herself was an employee of DBG 95 in at least part of 1992; and that she also performed work for other "DBG companies" in that year, including Dr. Build and Dreamline Cabinets. Thus, the disputed issued is whether DBG 95, Dr. Build, Dreamline Cabinets, and Galaxy Frame should be combined, as a matter of fact and law, and considered a single employer for Title VII purposes.

Appendix C

a. *Single Employer*

Recognizing her need to combine corporations to satisfy the minimum number of employees for jurisdictional purposes, plaintiff maintains that DBG 95, Dr. Build, Dreamline Cabinets, and Galaxy Frame constituted a single employer in 1992 due to their common ownership and highly integrated operations during the year. As stated above, the showing required to warrant a finding of single employer has been described as "highly integrated with respect to ownership and operations." *McKenzie*, 834 F.2d at 933. "Interrelation of operations" refers to such things as common officers, common record keeping, shared bank accounts and equipment, and other overlapping aspects of business operations. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 582 (7th Cir. 1993). Other critical factors indicative of a single employer include common management, common directors and boards, centralized control of labor relations and personnel, and common ownership and control. *Id.*

1. *DBG 95, Dr. Build and Dreamline Cabinet a Constitute a Single Employer*

Despite conflicting evidence, the undersigned finds that plaintiff has established, by a preponderance of the evidence, that DBG 95 , Dr. Build, and Dreamline Cabinets constituted a single employer in 1992 under the *McKenzie* factors.[2]

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2. The undersigned focuses on DBG 95 and not DBG 94 or DBG 96 because neither of those companies had any employees in 1992.

Appendix C

Corporate records and other documents reveal that Victor Ginsberg was the sole or majority owner for all three corporations, thereby establishing common ownership in 1992. These three corporations (sometimes referred to herein as the "DBG companies") also had highly integrated business operations in 1992. All three companies were incorporated by Victor Ginsberg and had the same or shared corporate officers in that year. All three companies used the same corporate address, used the same bank, and employed the services of the same accountant. All three companies operated from the same business location in Pompano Beach, Florida, and shared many of the same employees at different times during their existence.

Most significantly, all three companies, DBG 95, Dr. Build, and Dreamfine Cabinets, were under the direct control and supervision of Victor Ginsberg, who was directly heavily involved, as owner and chief operating officer, in the day-to-day operations of all three companies. Thus, Victor Ginsberg was involved in the hiring, interviewing, and selection of employees for all three companies. Victor Ginsberg was also closely involved with the advertising and sales programs of each company, the contracts negotiated and entered into by all three companies, and all other financial aspects of these companies, including business loans they obtained, employees salaries, and the annual financial statements for each company.

Defendants attempted to distinguish the business operations of these three companies by noting their different dates of incorporation, their distinct business operations, and their different telephone numbers, banking and checking accounts, unique letterheads and stationery, separate financial records, and individual tax returns filed by each company. While these distinctions are not to be overlooked, they simply are not enough to overcome a finding of single employer due to the extensive overlap of ownership and operations of these three companies. Victor Ginsberg himself viewed these companies collectively by referring to them, and other companies he owned, as the "DBG companies" in letters and other written materials used by these companies. Additionally, these three companies operated from the same business address and used many of the same employees and officers. These companies also frequently shared materials and equipment, paid business expenses for each other, and loaned employees to each other while meeting payroll expenses of each other depending on bank account balances for particular months. These extensive interrelations blurred the corporate distinctions between these three companies which appear in legal documents, tax records, and other business records of these companies. Thus, the undersigned finds that DBG 95, Dr. Build, and Dreamline Cabinets constituted a single employer in 1992 for Title VII purposes.

2. *Galaxy Frame was not part of this Single Employer*

While finding that DBG 95, Dr. Build, and Dreamline Cabinets constituted a single employer in 1992 due to their highly integrated operations and ownership, the undersigned does not find that Galaxy Frame should be included with

these three other companies as plaintiff's employer during that year. The evidence reveals that Galaxy Frame was established in 1992 and operated from the same warehouse facility used by the DBG companies. The evidence also indicates that Victor Ginsberg helped capitalize Galaxy Frame and was a minority shareholder of that company. Also, Galaxy Frame used the same architect and the same accountant as used by the DBG companies in 1992. Furthermore, the evidence reveals that Victor Ginsberg retained at least some control over Galaxy Frame by requiring, at least at the outset, that he authorize checks written in amounts over $200.00; and by visiting the Galaxy Frame business premises on a regular basis as part of his daily tour of the various companies located at the Pompano Beach warehouse.

Despite these similarities with the DBG companies, the undersigned finds that Galaxy Frame's business operations were significantly less integrated with the other DBG companies. First, Victor Ginsberg was not the sole owner of Galaxy Frame and did not manage its day-to-day operations as he did with the other DBG companies. Galaxy Frame was actually started by Steve Kesten, who met Victor Ginsberg, through Dominick Scarfo, for purposes of finding capital to begin the company. Steve Kesten, as general manager of Galaxy Frame, hired all of his own employees — none of whom ever worked for the DBG companies in 1992. Victor Ginsberg, while familiar with Galaxy Frame employees, did not interview or hire them as he did with employees of the DBG companies. Victor Ginsberg also did not manage Galaxy Frame in the sense of involving himself with the manufacturing and sale of its products, the solicitation of its customers, or in any other significant aspect of its daily operations.

Finally, and most importantly, the evidence does not establish a high degree of interrelatedness between Galaxy Frame and DBG 95, Dr. Build, and Dreamline Cabinets. Galaxy Frame was in the business of manufacturing picture frames and decorative accessories. Its customers were art galleries, designers, gift shops, and furniture stores. Galaxy Frame did not sell any of its products to, or do any business with, DBG 95, Dr. Build, or Dreamline Cabinets. Galaxy Frame had its own bank account and checking account; its own accounting and financial records, tax returns, contracts, letterhead, mailing address and logo; and had its own telephone and fax numbers which were not shared with the DBG companies.

Under these circumstances, and pursuant to the authorities cited above, the undersigned concludes that the business operations of Galaxy Frame were not highly integrated with the DBG companies so that it should not be combined with DBG 95, Dr. Build, and Dreamline Cabinets for purposes of establishing a single employer under Title VII in this case.

B. Insufficient Number of Employees

Having found that only DBG 95, Dr. Build, and Dreamline Cabinets should be combined to constitute a single employer, the undersigned next determines whether this single employer had at least fifteen employees for twenty weeks in 1992 to establish jurisdiction under 42 U.S.C. § 2000e(b). The parties have stipulated, in the joint statement mentioned above, that Dreamline Cabinets employed at least fifteen employees for the ten-week period between October

25 and December 31, 1992. Thus, for jurisdictional purposes, plaintiff would have to show that there were at least ten other weeks in that year when DBG 95, Dr. Build, and Dreamline Cabinets, individually or combined, employed fifteen or more employees.

Plaintiff attempts to meet its jurisdictional burden by listing nine weeks, between May 17, 1992 and August 8, 1992, when DBG 95, Dr. Build, and Dreamline Cabinets had exactly fifteen employees, counting Victor Ginsberg and certain other personnel; and one week, commencing October 18, 1992, when these companies had sixteen employees — again counting Victor Ginsberg as an employee.[3]

Defendants challenge plaintiff's jurisdictional position by arguing that the "single employer" here (i.e., DBG 95, Dr. Build, and Dreamline Cabinets) did not have at least fifteen employees for the requisite number of weeks in 1992

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3. As the charts attached to the parties' Joint Statement demonstrate, if Galaxy Frame is not included as part of a "single employer" here, there would be exactly twenty (20) weeks in 1992 where the "single employer" employed at least fifteen persons, i.e., the ten weeks beginning October 25 and ending December 31, 1992, plus each of the ten weeks beginning May 17, May 24, May 31, June 7, June 14, July 19, July 26, August 2, August 9, and October 18, 1992. However, in all but two of the latter ten weeks (i.e., the weeks beginning August 2 and October 18), there are no more than fifteen employers, even when Victor Ginsberg, Dominick Scarfo and certain part-time personnel are counted as "employees." Thus, if any of those persons are not counted as "employees", there would be no more than twelve weeks in which the "single employer" employed at least fifteen persons, and this Court would lack subject matter jurisdiction.

if Victor Ginsberg, Dominick Scarfo, and certain part-time personnel are not counted as "employees." Defendants then argue that none of these individuals should be considered an "employee" under the facts of this case. The undersigned agrees with defendants' position but finds it necessary to only address whether Victor Ginsberg was an employee of the DBG companies in 1992. If not, plaintiff would fall short of establishing jurisdiction even if Dominick Scarfo and the part-time personnel are considered employees of those companies.

Reviewing the evidence and applicable law, the undersigned finds that Victor Ginsberg was an owner, officer and manager of DBG 95, Dr. Build, and Dreamline Cabinets (i.e., the "single employer" here) but not an "employee" for Title VII purposes. Federal [sic] is well-settled that "owners are not considered employees within the meaning of Title VII". *Norman v. Levy*, 767 F.Supp. 1441, 1446 (N.D. Ill. 1991) (citing *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977)). An owner may only be counted as an "employee" when he or she performs "traditional employee functions." *EEOC v. Pettegrove Truck Serv., Inc.*, 716 F.Supp. 1430, 1433 (S.D. Fla. 1989) (counting as "employees" owners of truck service company who performed bookkeeping, were responsible for sales, drove trucks, operated a backhoe, and derived financial support from the operations of the company). In this case the evidence does not establish that Victor Ginsberg performed such "traditional employee functions" or that he should be deemed anything other than an owner and controller of these companies. The record evidence clearly reveals that Victor Ginsberg did not perform "traditional employee functions" for the DBG companies here

such as physically constructing or supervising the construction of homes, repairing homes, selling or marketing homes, building, selling or marketing cabinets, washing floors, keeping the books, or any other such functions. In addition, Victor Ginsberg did not draw a salary or any other form of compensation or support from the DBG companies. Furthermore, Victor Ginsberg did not report to anyone; he was not required to be at work at any specific time; he did not keep track of his hours; and he spent only infrequent hours at the offices of these companies while spending only a few minutes each week on matters devoted to actual business activities of these companies.

The activities in which Victor Ginsberg was engaged for these companies (i.e., approving payments, selecting contractors, making hiring decisions, selecting fixtures to be included in the homes his companies were constructing, negotiating contracts, and providing input into marketing and advertising campaigns) were "traditional executive decisions" which "simply resulted from his status as owner who wish[ed] to increase the value of his property," and who was interested in the success of the corporations in which he had a significant financial investment. *Norman*, 767 F.Supp. at 1446; *Edwards v. Esau Invs., Inc.*, 1994 U.S. Dist. LEXIS 15960, 66 F.E.P. Cases 711 (D.Kan. 1994) (vice president of corporation was not an "employee" under Title VII, notwithstanding that her signature appeared on numerous corporate documents, where plaintiff did not demonstrate that this officer performed traditional employee duties). Thus, plaintiff has failed to establish that Victor Ginsberg acted other than as an owner and controller of these companies so that the undersigned concludes that he should not be counted as an "employee" of the DBG companies.

Having determined that Victor Ginsberg was not an employee here, the undersigned finds that plaintiff has failed to show that DBG 95, Dr. Build, and Dreamline Cabinets, individually or combined, constitute a single employer with twenty or more employees for twenty weeks in 1992.[4] Thus, the undersigned finds that plaintiff has failed to establish federal jurisdiction under 42 U.S.C. § 2000e(b).

RECOMMENDATION

For all of the foregoing reasons, the undersigned finds that this Court lacks subject matter jurisdiction under 42 U.S.C. § 2000e(b). Thus, the undersigned recommends that this action be **DISMISSED** in its entirety for lack of jurisdiction, including plaintiff's pendent state law claims.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Wilkie D. Ferguson, Jr., United States District Judge, within ten (10) days of receipt. *See* 28 U.S.C. sec. 636(b)(1)(C); *United States v. Warren*, 687 F.2d 347 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983); *Hardin v. Wainwright*, 678 F.2d 589 (5th Cir. Unit B 1982); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

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4. Again, the undersigned finds it unnecessary to determine whether Dominick Scarfo and the part-time personnel of the DBG companies were "employees" due to the finding that Victor Ginsberg was not an employee. By that finding alone, plaintiff cannot establish jurisdiction in this case.

Appendix C

RESPECTFULLY SUBMITTED at Miami, Florida, this 2nd day of December 1996.

s/ Ted E. Bandstra
TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Honorable Wilkie D. Ferguson, Jr.
Counsel of record

APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED NOVEMBER 9, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 93-6918-CIV-FERGUSON

ELAINE A. SCARFO,

Plaintiff,

vs.

VICTOR GINSBERG; DBG 94, INC.; DBG 95, INC., and DBG 96, INC., Florida corporations,

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Defendants' Motion for Summary Judgment or Alternatively, Motion for Partial Summary Judgment (D.E. 87) filed on January 23, 1995. Previously, all pretrial motions in this case were referred to the undersigned by the Honorable Wilkie D. Ferguson, Jr., for resolution pursuant to 28 U.S.C. § 636(b). Accordingly, the undersigned conducted a hearing on this motion on October 18, 1995. Upon review of the pleadings, the evidence in the record of this case, oral argument of counsel and applicable law, the undersigned recommends that Defendants' Motion for Summary Judgment be DENIED in its entirety for reasons explained below.

Appendix D

INTRODUCTION

This is a sexual harassment and employee discrimination case brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq., in which plaintiff, Elaine A. Scarfo, seeks to redress injuries allegedly sustained as a result of employment discrimination and sexual harassment by her employer in 1992. More specifically, plaintiff seeks damages for allegedly being subjected to a hostile work environment and to acts of employment discrimination on the basis of sex in violation of Title VII. In addition, plaintiff seeks damages at common law for battery, intentional infliction of emotional distress, and invasion of privacy under Florida common law. Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(F)(3), with respect to the federal claims; and pursuant to 28 U.S.C. § 1367(c) with respect to the state law claims.

Based on discovery conducted to date, defendants have moved for summary judgment on the Title VII claims for lack of subject matter jurisdiction; or, alternatively, on all claims of the complaint on the basis of insufficient evidence. More specifically, defendants argue that this Court lacks subject matter jurisdiction over the Title VII claims because plaintiff's "employer" did not employ fifteen or more employees for at least twenty weeks for the relevant year as required for federal jurisdiction under 42 U.S.C. § 2000e. Alternatively, defendants argue that discovery has revealed that plaintiff was not subjected to "unwelcome" sexual harassment by her employer or to a hostile work environment as evidenced by plaintiff's own conduct.

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Plaintiff opposes defendants' motion arguing that her "employer" had more than fifteen employees in 1992, the relevant year, who worked at least twenty weeks during that year, so that this Court has jurisdiction under § 2000e. Making this argument, plaintiff maintains that defendant, Victor Ginsburg, owned and operated several corporations which should be grouped together as a single employer for, if viewed separately, as her joint employer for Title VII purposes. Plaintiff also opposes summary judgment on the ground that sufficient evidence exists in the record to support her Title VII and common law claims.

STANDARD OF REVIEW

The court in reviewing a motion for summary judgment is guided by the standards set forth in Rule 56(c) of the Federal Rules of Civil Procedure which provides as follows:

> . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

The moving party bears the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). Further, in addressing whether the moving party has satisfied this burden, the court is required to view the evidence and all factual inferences arising therefrom in the light most favorable to the

non-moving party. *Clemons v. Dougherty County, Ga.*, 684 F.2d 1365, 1368 (11th Cir. 1982), *citing*, *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608; *Augusta Iron & Steel Works v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). If the record presents issues of material fact, the court must deny the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608. The non-moving party, however, cannot rest upon mere allegations, but must rebut any facts properly presented by the moving party through affidavits or other evidence demonstrating the existence of a genuine and material issue of fact for trial. *Id.* at 398 U.S. 155, 90 S.Ct. at 1607. Moreover, summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986).

ANALYSIS

A. *Federal Jurisdiction Under 42 U.S.C. §2000e.*

The preliminary issue raised by defendants' motion for summary judgment is whether this Court has subject matter jurisdiction over the Title VII claims. Resolution of this issue hinges on whether defendants are an "employer" subject to Title VII liability under the Civil Rights Act of 1964. The term "employer" is defined in the Act as

> . . . a person engaged in an industry affecting commerce who has fifteen or more employees for

> each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . .

42 U.S.C. § 2000e(b). The parties agree that the relevant calendar year is 1992. The parties dispute whether defendants were a single or joint employer with fifteen or more employees working each day for twenty or more calendar weeks in 1992.

Addressing this jurisdictional issue, the undersigned begins with certain well-recognized principles used in determining this issue in Title VII cases. First, federal courts have recognized that the term "employer" as used in Title VII of the Civil Rights Act is to be liberally construed. *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987); *Trevino v. Celanese Corp.*, 701 F.2d 397, 403 (5th Cir.), *reh. denied*, 707 F.2d 515 (5th Cir. 1983). Two or more separate business entities may constitute a single or joint "employer" for Title VII purposes depending on the relationship of those business entities to each other. The predominate test in determining whether two business entities should be treated as a single or joint employer under § 2000e(b) is to apply the standards promulgated by the National Labor Relations Board ("NLRB"). *McKenzie*, 834 F.2d at 933 (citing cases). These NLRB factors include: (1) inter-relations of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Id.* Courts applying this four-part test in Title VII cases have focused on the second factor. *Trevino*, 701 F.2d at 404 (citing cases). Federal courts have also held that the showing required to warrant a single

employer status has been described as "highly integrated with respect to ownership and operations." *McKenzie, supra* (citing *Fike v. Gold Kist, Inc.*, 514 F.Supp. 722, 726 (N.D. Ala.), *aff'd.*, 664 F.2d 995 (11th Cir. 1981)).

The evidentiary record in this case contains conflicting evidence on this jurisdictional issue. Defendants point to evidence indicating that they are separate business entities and that they, either individually or collectively, did not employ at least 15 employees for twenty weeks in 1992. Plaintiff presents the opposing view based on evidence indicating that defendants were her joint employer or constituted a single employer under the NLRB factors listed above.

Reviewing the evidence, the undersigned finds that there are genuine issues of material fact in dispute preventing summary judgment in defendants' favor on the jurisdictional issue. Thus, the evidence reveals that the defendant companies, together with Galaxy Frame, Inc., Dreamline Cabinet Systems Inc., and Dr. Build, Inc., were commonly owned, at least in part, by defendant Victor Ginsburg. The evidence is conflicting with respect to which of these companies actually employed plaintiff in 1992. Plaintiff received W-2 forms from Dr. Build, Dreamline and DBG 95 at various times throughout the year. Additionally, plaintiff testified at deposition that she performed work for each of these companies during 1992 and was paid by whichever company had money in its account at the time.

Other evidence supports plaintiff's position that these corporations were highly interrelated in ownership and

operations for "single employer" purposes. All of the corporations, except Galaxy Frame, were owned by Victor Ginsburg, who is also the incorporator, president, and director of each corporation (other than Galaxy Frame). In 1992, the corporate address of the DBG companies, Dreamline, Dr. Build and Galaxy Frame was the same. The various DBG companies were commonly referred to as "the DBG companies". All of these companies had bank accounts at the same bank and, at times, wrote checks to cover expenses of each other. Thus, while it would be premature on the basis of this evidence to conclude that defendants are a single or joint employer for Title VII purposes, plaintiff presents sufficient evidence to create substantial issues of material fact on the single and/or joint employer issue.

Likewise, the record contains sufficient evidence to create material issues of fact concerning the number of employees who worked for defendants as their "employer" in 1992. Obviously, the precise number of employees working for plaintiff's "employer" hinges on whether plaintiff worked for joint employers working for plaintiff's "employer", or whether defendants should be regarded as a single employer with other unnamed companies because of the interrelationships addressed above. Other factual disputes focus on whether plaintiff's employer had full or part time employees in 1992, when such employees worked for defendants during the year, and whether certain persons, including Victor Ginsburg, should be regarded as "employees" for Title VII purposes.

In summary, the undersigned finds sufficient evidence in the record of this case to create material issues of fact

with respect to the jurisdictional issue. Accordingly, the undersigned recommends that this motion be denied to the extent that defendant's challenge this Court's lack of jurisdiction under 42 U.S.C. § 2000e(b).

B. *Victor Ginsburg's Individual Liability*

Defendant Victor Ginsburg also moves for summary judgment on the ground that plaintiff inappropriately names him as an individual defendant in the case. Defendant Ginsburg argues that the evidence is undisputed that he personally did not employ plaintiff or any other employees so he cannot be held individually liable as an "employer" under Title VII.

Reviewing the evidence and cited cases, the undersigned disagrees with Ginsburg's position. Seeking dismissal, Ginsburg relies predominately on *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991), in which the Eleventh Circuit, in a civil rights action brought against a municipality, broadly stated that "[i]ndividual capacity lawsuits under Title VII are . . . inappropriate." In *Busby*, however, the plaintiff attempted to sue individual police officers of the defendant municipality who were clearly not the employer. Here, plaintiff sues Victor Ginsburg, individually, in his capacity as employer. The Eleventh Circuit in *Busby* did not address this situation except to state that:

> The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act. (citations omitted). . . . We think the proper method for a

> plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly.

Id.

Here, plaintiff has sued Victor Ginsburg as her employer, not as an employee, which is provided for in the *Busby* decision. Also, Victor Ginsburg can be found individually liable to plaintiff as a managing agent and principal of the corporate employer for his actions that violate Title VII. *See Stockett v. Tolin*, 791 F.Supp. 1536, 1554 (S.D. Fla. 1992). Of course, the burden of proof remains with plaintiff to prove that Victor Ginsburg was her employer and that he, either individually or in combination with other defendants, was an "employer" as defined by 42 U.S.C. § 2000e(b). Once again, facts are in dispute which prevent a pretrial ruling on this issue.

Accordingly, the undersigned recommends that Defendant's Motion to Dismiss Victor Ginsburg as an individual defendant in this case be DENIED.

C. *Evidence of Sexual Harassment*

Next, defendants move for summary judgment on plaintiff's claim of sexual harassment based on a hostile work environment on the grounds that undisputed evidence establishes that plaintiff was subjected to no "unwelcome" sexual harassment by Ginsburg, and that no sexual harassment was so severe or perverse so as to adversely effect

any term, condition or privilege of her employment. Defendants base their argument on evidence indicating that plaintiff never objected to Ginsburg's alleged sexual advances and even appeared, at times, to be a willing participant in various activities or conversations of a sexual nature with Ginsburg. Defendants point, in particular, to plaintiff's deposition testimony in which she expressed love for Ginsburg, thought of him during sex with her husband, and allowed or initiated physical intimacies with Ginsburg. Defendants also note that plaintiff began working for Ginsburg after she was allegedly subjected to Ginsburg's sexual advances; and continued to work for him and his companies without complaining to anyone about that conduct. Under these circumstances, defendants argue that plaintiff cannot establish that she perceived her work environment to be hostile or abusive. Defendants also argue, based on this same evidence, that plaintiff cannot establish a claim of quid pro quo sexual harassment because she is unable to prove she was subjected to unwelcome sexual harassment.

Reviewing the record, the undersigned once again finds material facts in dispute. While defendants present evidence suggesting that plaintiff was a willing participant in the alleged sexual activities and conversations with Ginsburg, plaintiff presents evidence to the contrary. In particular, plaintiff notes from her own deposition that the nature of Ginsburg's alleged sexual advances made prior to her employment were infrequent and less severe. Plaintiff also testified that she repeatedly resisted Ginsburg's advances, told him to stop, and otherwise attempted to make clear that his conduct was not welcome. Plaintiff also testified that

the terms of her employment were greatly affected by her hostile work environment, and that she was physically and emotionally disturbed by the alleged conduct. Finally, plaintiff testified that Ginsburg conditioned her continued employment and salary on her compliance with his alleged sexual demands.

Due to this conflicting evidence, the undersigned finds no basis to grant summary judgment in defendants' favor on the Title VII claims. Plaintiff's Title VII claims are based on both quid pro quo sexual harassment and hostile work environment harassment. Quid pro quo sexual harassment occurs when an employer alters an employee's job conditions as a result of the employee's refusal to submit to sexual demands. *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315 (11th Cir.), *reh. denied*, 874 F.2d 821 (11th Cir. 1989). Hostile environment sexual harassment occurs when the employer's conduct "has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile or offensive work environment." *Id.* Where sexual harassment is "sufficiently severe so as to alter the conditions of employment and create an abusive working environment . . . a Title VII claim is made out 'irrespective of whether the complainant suffers tangible job detriment.' " *Stockett, supra*, 791 F.Supp. at 1555.

Here, plaintiff presents evidence of both forms of sexual harassment, as outlined above, sufficient to defeat summary judgment on her Title VII claims.

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D. *Remaining Issues*

Finally, defendants move for summary judgment on plaintiff's cause of action for intentional infliction of emotional distress, and to strike plaintiff's claim for punitive damages on the claim, on the grounds that (1) Ginsburg's alleged conduct was not so outrageous or extreme to allow any recovery under Florida law; (2) plaintiff fails to prove any alleged injury resulting from that conduct; and (3) plaintiff fails to prove Ginsburg's intent to cause severe emotional distress by his sexual advances. Having already found conflicting evidence with respect to similar arguments made in response to the Title VII claims, the undersigned recommends that plaintiff's motion for summary judgment on this common law claim and to strike plaintiff's request for punitive damages also be DENIED.

SUMMARY

For all of the foregoing reasons, the undersigned respectfully recommends that Defendant's Motion for Summary Judgment or Alternatively, Motion for Partial Summary Judgment be DENIED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Wilkie D. Ferguson, Jr., United States District Judge, within ten (10) days of the receipt. *See* 28 U.S.C. sec. 636(b)(1)(C); *United States v. Warren*, 687 F.2d 347 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983); *Hardin v. Wainwright*, 678 F.2d 589 (5th Cir. Unit B 1982); *see also Thomas v. Arn.*, 474 U.S. 140 (1985).

Appendix D

RESPECTFULLY SUBMITTED at Miami, Florida this 9th day of November, 1995.

s/ Ted E. Bandstra
Ted E. Bandstra
United States Magistrate Judge

APPENDIX E — ORDER AFFIRMING MAGISTRATE'S REPORT AND RECOMMENDATION DATED AND FILED JANUARY 31, 1996

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No. 93-6918-CIV-FERGUSON

ELAINE A. SCARFO,

Plaintiff,

vs.

VICTOR GINSBERG, DBG 94, INC., DBG 95, INC., and DBG 96, INC.,

Defendants.

ORDER AFFIRMING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon the Defendants' Motion for Summary Judgment or Alternatively, Motion for Partial Summary Judgment filed January 23, 1995.

THE MATTER was referred to the Honorable Ted E-Bandstra, United States Magistrate Judge, pursuant to 28 U.S.C. §639(b). A Report and Recommendation dated November 9, 1995 has been filed, recommending that the Motion for Summary Judgment be denied in its entirety. The defendants have filed objections to the Report. The Court

has reviewed the Report and Recommendation, objections and responses thereto, and the pertinent portions of the file. Accordingly, it is

ORDERED AND ADJUDGED that United States Magistrate Judge Ted E. Bandstra's Report and Recommendation of November 9, 1995 is hereby AFFIRMED in its entirety, and based thereon, the defendants' Objections thereto are OVERRULED.

DONE AND ORDERED in Chambers at Miami, Florida, this 31 day of January, 1996.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Counsel of Record

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 13, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5244

ELAINE A. SCARFO,

Plaintiff-Appellant,
Cross-Appellee,

versus

VICTOR GINSBERG, DBG 94, INC.,
et al., Florida Corporations,

Defendant-Appellees,
Cross-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: BARKETT, Circuit Judge and RONEY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix F

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
FEB 2 2000
OFFICE OF THE CLERK

(2)

No. 99-1012

In The

Supreme Court of the United States

ELAINE A. SCARFO,

Petitioner,

v.

VICTOR GINSBERG, DBG 94, INC., DBG 95, INC. and DBG 96, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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20pp

QUESTION PRESENTED

Prior to determining whether it should consider Petitioner's Question Presented for Review, this Court should consider the following question:

Is it appropriate for this Court to consider the question of whether the determination of "single employer" status under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §2000e *et seq.*, as amended ("Title VII"), is a threshold issue of subject matter jurisdiction to be resolved by the trial court, and not by a jury, where:

(a) Petitioner failed to properly raise this issue before the United States Court of Appeals for the Eleventh Circuit; and

(b) It is unlikely that this Court would reach the question which Petitioner has presented for review, particularly in light of the fact that Petitioner waived any right she may have had to a jury trial on any alleged disputed issues of material fact concerning "single employer" issues, by expressly consenting on the record to having the District Court conduct an evidentiary hearing to resolve any such issues of fact, and by not requesting that a jury determine those issues until after the Magistrate Judge already had completed a five-day evidentiary hearing and issued his report and recommendation on the "single employer" issues?

DISCLOSURE STATEMENT PURSUANT TO RULE 29(6)

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondents DBG 94, INC., DBG 95, INC. and DBG 96, INC. (collectively, the "Corporate Respondents"), by and through their attorneys, notify the Court that none of the Corporate Respondents has a corporate parent or any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case omits important aspects of the procedural history of this matter including, but not limited to, Petitioner's waiver of her right to a jury trial on the "single employer" issues. Respondents offer the following as a more complete account of the relevant history of this matter.

A. Proceedings in the District Court

On October 26, 1993, Petitioner filed a Title VII action in the United States District Court for the Southern District of Florida ("District Court"), against Dr. Victor Ginsberg ("Dr. Ginsberg") and certain corporate defendants controlled by him, i.e., DBG 94, Inc. ("DBG 94"), DBG 95, Inc. ("DBG 95") and DBG 96, Inc. ("DBG 96") (collectively "Corporate Defendants"), claiming that she was subjected to a sexually hostile work environment and was discharged in alleged retaliation for allegedly insisting that the alleged acts of harassment cease.

None of the Corporate Defendants was an "employer, within the meaning of Title VII, i.e., none of the Corporate Defendants employed at least fifteen (15) employees for at least twenty (20) weeks in 1992, when the alleged harassment allegedly occurred. However, Petitioner contended that the District Court nevertheless had jurisdiction over her Title VII claims because the Corporate Defendants, together with Dr. Build, Inc. ("Dr. Build"), Dreamline Cabinet Systems, Inc. ("Dreamline") and an additional corporation, Galaxy Frame, Inc. ("Galaxy"), **none of which were named as defendants**, constituted a single "employer" which, allegedly, did employ at least

fifteen (15) employees for at least twenty (20) weeks in 1992.

On January 23, 1995, after the parties had engaged in discovery, Respondents filed a Motion for Summary Judgment or, Alternatively, Motion for Partial Summary Judgment ("Summary Judgment Motion"). In their Summary Judgment Motion, Respondents contended, *inter alia*, that the undisputed material facts, demonstrated as a matter of law, that: (a) DBG 95, Dr. Build and Dreamline did not constitute a "single employer" under Title VII; (b) Galaxy was not part of a "single employer" together with DBG 95, Dr. Build and Dreamline; and (c) even if DBG 95, Dr. Build, Dreamline and Galaxy constituted a "single employer," that entity did not employ fifteen (15) or more employees for at least twenty (20) weeks during 1992.

On November 9, 1995, the Magistrate Judge, to whom the District Court referred Respondents' Summary Judgment Motion, issued a Report and Recommendation ("1995 Report"), in which he recommended denial of Respondents' Summary Judgment Motion in its entirety, finding generally that there were "substantial issues of material fact on the single and/or joint employer issue" (App. D to Pet., at 45a).[1] After Respondents filed their Objections to the 1995 Report, on January 31, 1996, the District Court issued a one-page Order which affirmed the Report in its entirety, without specifically addressing any of Respondents' Objections to the Report (App. E to Pet.).

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[1] References to the Appendix to the Petition for a Writ of Certiorari are denoted by "App. ___ to Pet." References to the Appendix to this Response are denoted by "App. ___".

On February 20, 1996, the District Court held a pretrial conference. At that conference, Respondents asserted that the District Court was required to conduct an evidentiary hearing regarding the "single employer" issues in order to determine whether it had subject matter jurisdiction (App. A, at 2a-3a). Counsel for Petitioner responded as follows:

> MR. WEISBERG: What the defendant is raising goes to how the whole trial should be conducted . . . **defendant has indicated they believe the Court, not the jury, should ultimately make the decision on the subject matter jurisdiction, and we don't quarrel with that, and how I would foresee presenting the case is that Judge Moreno did this.**
>
> . . . [W]e present the case simultaneously to the jury, and where there is certain evidence that would just go to subject matter jurisdiction. [sic] We would then just present that to the Court.

(App. A, at 3a-4a) (emphasis added). Based on Petitioner's agreement to have the District Court determine the "single employer" issues, the District Court then referred the "single employer" issues to a Magistrate Judge (the "Magistrate") for an evidentiary hearing and the issuance of a report and recommendation (App. A, at 6a).

The Magistrate conducted evidentiary hearings on the "single employer" issues on May 14, June 6 and 7 and September 11 and 12, 1996. On December 2, 1996, the Magistrate issued a Report and Recommendation ("Report"), in which he recommended that the District Court dismiss the action (App. C to Pet.).

After resolving any and all disputed issues of fact regarding the "single employer" issues in favor of Petitioner, the Magistrate concluded that DBG 95, Dr. Build and Dreamline constituted a "single employer" (App. C to Pet., at 29a-31a).[2] However, the Magistrate further concluded, based on the undisputed facts, that, as a matter of law, Petitioner "[had] not establish[ed] the high degree of interrelatedness between **Galaxy** and DBG 95, Dr. Build and Dreamline Cabinets" necessary for **Galaxy** to be deemed part of that "single employer" (App. C to Pet., at 33a) (emphasis added). The Magistrate went on to conclude, based on the undisputed material facts, that, as a matter of law, the "single employer" consisting of DBG 95, Dr. Build and Dreamline lacked the minimum fifteen (15) employees required under Title VII (App. C to Pet., at 37a).

Petitioner filed Objections to the Report. In her Objections, Petitioner contended for the first time that, under *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997), the jury, and not the trial court, should determine alleged disputed issues of fact regarding the "single employer" issues. On March 20, 1997, the District Court heard oral argument on those Objections. On June 17, 1997, the District Court issued an Order of Dismissal, affirming the Report ("Dismissal Order") (App. B to Pet.). In so doing, the District Court applied a **summary judgment standard** and determined that: (a) the undisputed material facts established that, as a matter of law, **Galaxy**

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[2] The parties had stipulated that neither of the other Corporate Defendants, i.e. DBG 94 or DBG 96, had any employees.

could **not** be deemed part of a "single employer" together with DBG 95, Dr. Build and Dreamline; and (b) the entity consisting of DBG 95, Dr. Build and Dreamline lacked the minimum fifteen (15) employees required under Title VII (App. B to Pet.).

B. Disposition by the Court of Appeals for the Eleventh Circuit

Petitioner appealed the District Court's Dismissal Order to the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). In her submissions to the Eleventh Circuit, Petitioner did not challenge Eleventh Circuit precedent which held that whether a defendant in a Title VII case was an "employer," within the definition of Title VII, was a threshold issue of subject matter jurisdiction. *See Virgo v. Rivera Beach Associates, Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994). Instead, Petitioner, relying on *Garcia v. Copenhaver, supra*, contended that even if "single employer" determinations involved threshold issues of subject matter jurisdiction, the District Court, nevertheless, did not have the authority to resolve alleged disputes of material facts regarding "single employer" issues because such issues were intertwined with the facts relating to the elements of a cause of action under Title VII.

In their Answer Brief, Respondents urged the Eleventh Circuit to affirm the District Court's Dismissal Order for the following reasons:

A. Under Eleventh Circuit precedent, as set forth in *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417 (11th Cir. 1998), the District Court had no authority to consider

whether Respondents, together with Dr. Build, Dreamline and Galaxy, constituted a "single employer," because Petitioner named only one of the four (4) corporations which Petitioner contends collectively constitute a "single employer, " i.e. DBG 95, as a defendant in her complaint;

B. Petitioner waived whatever right she otherwise may have had to have a jury determine any disputed material issues of fact regarding the "single employer" issues, by expressly consenting on the record in open court to having the District Court conduct an evidentiary hearing to resolve any such issues of fact, and by not requesting that a jury determine those issues until after the Magistrate already had completed a five-day evidentiary hearing and issued his Report;

C. The District Court had the authority to make factual determinations in deciding whether it had subject matter jurisdiction over Petitioner's Title VII claims under the "single employer" doctrine, because the determination of the "single employer" issues did not implicate the merits of Petitioner's Title VII claims;

D. Assuming, *arguendo*, that Petitioner was entitled to have a jury decide any disputed material issues of fact regarding the "single employer" doctrine, the District Court correctly determined that Petitioner failed to demonstrate the existence of any disputed material issues of fact which would preclude the District Court from entering summary judgment in favor of Respondents on the "single employer" issues.

On May 14, 1999, the Eleventh Circuit affirmed the District Court's Dismissal Order (App. A to Pet.). In so doing, the Eleventh Circuit did not address Respondents'

contention that the District Court had no authority to consider whether it had subject matter jurisdiction under the "single employer" doctrine where only one of the four (4) corporations which Petitioner contends collectively constitute a "single employer" was named as a defendant. Nor did the Eleventh Circuit address Respondents' contention that Petitioner had waived whatever right she may have had to a jury trial on the "single employer" issues. Instead, the Eleventh Circuit held that "single employer" issues involve threshold issues of subject matter jurisdiction and do not implicate the merits of a Title VII claim (App. A to Pet., at 7a-9a).[3] On September 13, 1999, the Eleventh Circuit denied Petitioner's Petition for Rehearing En Banc (App. F to Pet.).

REASONS FOR DENYING THE WRIT

A. Petitioner Failed to Properly Raise Before the Eleventh Circuit the Issue of Whether a "Single Employer" Determination Involves a Threshold Issue of Subject Matter Jurisdiction.

Petitioner contends that this Court should grant certiorari because in those limited instances where a "single

[3] The Eleventh Circuit also did not address Respondents' contention that, even assuming, *arguendo*, that Petitioner was entitled to have a jury decide any disputed material questions of fact regarding the "single employer" issues, the District Court had correctly determined that Petitioner failed to demonstrate the existence of any disputed facts which precluded it from entering summary judgment in favor of Respondents on the "single employer" issues.

employer" determination is necessary in order to determine whether a defendant is an "employer" under Title VII, there is a conflict between the Eleventh Circuit and other circuit courts of appeals as to whether "single employer" determinations involve threshold issues of subject matter jurisdiction, or only involve the **merits** of a Title VII claim. *Compare Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999), *with E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623 (D.C. Cir. 1997).[4] *But see* 117 F.3d at 626 (where, J. Santelle, in a concurring opinion, acknowledged that the D.C. Circuit had previously held that "single employer" issues did not involve threshold issues of subject matter jurisdiction, but stated that the Eleventh Circuit's determination that such issues do involve threshold issues of subject matter jurisdiction was correct).

However, Petitioner **never argued** to the Eleventh Circuit panel which considered her appeal that the Eleventh Circuit's conclusion that "single employer" issues under Title VII involve threshold issues of subject matter jurisdiction was erroneous.[5] Instead, Petitioner argued

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[4] The Seventh Circuit, in *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998), had held that "single employer" determinations under Title VII involve the merits of a Title VII claim and do not involve issues of subject matter jurisdiction. Subsequently, however, in *Papa v. Katy Indus. Inc.*, 166 F.3d 937, 939-40 (7th Cir.), *cert. denied*, ___ U.S. ___, 120 S. Ct. 526 (1999), the Seventh Circuit held that the "single employer" analysis, which was a test formulated by the National Labor Relations Board to determine the appropriate collective bargaining unit, could not be applied in determining whether a defendant constituted an "employer" under Title VII.

[5] Petitioner did not raise this issue until she filed her Petition for Rehearing En Banc ("Rehearing Petition").

unsuccessfully to the Eleventh Circuit that while "single employer" determinations under Title VII do involve issues of subject matter jurisdiction, those issues are intertwined with the merits of a Title VII claim.[6] In view of Petitioner's failure to raise with the Eleventh Circuit the question she has presented for review by this Court, this Court should not consider that question, regardless of the existence of any conflict between the Eleventh Circuit and the District of Columbia Circuit on that issue. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1956 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them" (cases cited therein)); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily, this Court does not decide questions not raised or involved in the lower court"); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S. Ct. 1961, 1968, n. 3 (1999) (same); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) (same).

However, the Eleventh Circuit did not consider the Rehearing Petition because no member of the original Eleventh Circuit panel or any other judge requested that the circuit court be polled on rehearing en banc (App. F to Pet.).

[6] Respondents are unaware of any circuit court of appeals which holds that "single employer" determinations involve **both** issues of subject matter jurisdiction **and** the merits of a Title VII claim.

B. This Court Is Unlikely to Reach the Question Which Petitioner Has Presented for Review

This Court should also deny the requested Writ because it is unlikely that this Court would ever reach the question of whether a "single employer" determination under Title VII involves a threshold issue of subject matter jurisdiction, for determination by the trial court, or involves an element of a cause of action under Title VII for determination by the jury.

Before reaching that issue, this Court would have to consider whether Petitioner waived whatever right she may have to a jury trial on alleged disputed issues of material fact regarding the "single employer" issues. As noted above, Petitioner, through counsel, **expressly consented** to an evidentiary hearing by the District Court on the single employer issues (App. A, at 3a-4a).[7] Accordingly, Petitioner has waived whatever right she otherwise may have had to have a jury consider any issue relating to subject matter jurisdiction. *See Haynes v. W.C. Caye & Co. Inc.*, 52 F.3d 928, 930 n. 3 (11th Cir. 1995) (cases cited therein) (noting that a failure to object to a non-jury fact-finding proceeding constituted a waiver of the right to a jury trial as to factual issues decided in such proceeding,

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[7] As noted in *Garcia*, 104 F.3d at 1262, at the time Petitioner consented to an evidentiary hearing on the "single employer" issues, there was no binding authority, either from the Eleventh Circuit or the Southern District of Florida, as to whether the "single employer" issue was for the trial court or the jury to decide. Thus, if Petitioner intended to preserve her right to a trial by jury on the "single employer" issue, she should have stated her objection to having the District Court decide those issues via an evidentiary hearing.

and holding that a plaintiff who did not raise an objection to a non-jury trial until after the magistrate issued his report and recommendation waived his right to a jury trial); *In re City of Philadelphia Litigation*, 158 F.3d 723, 727 (3d Cir. 1998) (cases cited therein) (where the Third Circuit, in explaining "the well-established rule," adopted by a majority of the circuit courts of appeal, that "a party's participation in a bench trial without objection waives any Seventh Amendment right to a jury trial that the party may have had," noted that "a party should not be permitted to silently acquiesce in a trial court's plan to try an issue non-jury by failing to make a timely objection and later demand a new trial only after it has lost on the merits"); *Fields Engineering & Equipment, Inc. v. Cargill, Inc.*, 651 F.2d 589, 592 (8th Cir. 1981) (oral agreement by plaintiff's counsel, at pretrial conference, to non-jury trial constituted waiver of right to jury trial); *Smith v. Cushman Motor Works*, 178 F.2d 953, 954 (8th Cir. 1950) (party which did not object to the trial court's decision to determine whether a valid contract existed between the parties, rather than having that issue submitted to the jury, waived any right to insist that that issue be submitted to a jury).

In addition, before this Court could determine whether disputed issues of fact regarding "single employer" determinations are to be made by the trial court or the jury, this Court would first have to determine whether the "single employer" doctrine has any application at all to Title VII cases. As noted above, in *Papa v. Katy Indus. Inc.*, 166 F.3d 937, 939-40 (7th Cir.), *cert. denied*, ___U.S.___, 120 S. Ct. 526 (1999), the Seventh Circuit,

overruling its prior decision in *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 582 (7th Cir. 1994), and disagreeing with the decisions of various other circuit courts of appeals, held that the "single employer" analysis could not be applied in Title VII cases. Instead, the Seventh Circuit held that a Title VII defendant with less than the minimum fifteen (15) employees required under Title VII could not be deemed part of a "single employer" together with a parent corporation or other corporation affiliated with the defendant unless: (a) conditions were present for "piercing the corporate veil" to allow a creditor of the defendant to sue the defendant's parent or other affiliate; (b) the parent or affiliated corporation had **deliberately** left the defendant with less than the Title VII statutory minimum number of employees **for the express purpose** of avoiding liability under Title VII; or (c) the parent or affiliated corporation **actually directed** the alleged discriminatory acts. *Id.* at 940-41.

If and only if this Court concludes that the "single employer" analysis may be applied in the Title VII context, would this Court be in a position to consider whether, in those **limited** instances where there are disputed issues of fact regarding application of the "single employer" doctrine, such issues of fact should be resolved by the trial court or the jury.

In view of the fact that this Court may not reach the question for review which Petitioner has presented, this Court should deny the Petition.

CONCLUSION

For all of the above reasons, Respondents respectfully submit that this Court should deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A – EXCERPTS FROM TRANSCRIPT OF HEARING IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA HELD ON FEBRUARY 20, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-6918-CIV-FERGUSON

ELAINE A. SCARFO,

Plaintiff,

vs.

VICTOR GINSBERG; DBG 94, INC.; DBG 95, INC; and DBG 96, INC., Florida corporations,

Defendants.

APPEARANCES:

For the Plaintiff: ROBERT WEISBERG, ESQ.

For the Defendant: MAURICE BAUMGARTEN, ESQ.

Court Reporter: PAUL HAFERLING
301 North Miami Avenue
Miami, Florida 33128

[2] MR. WEISBERG: Robert Weisberg and Martha Chapman for the plaintiff Elaine Scarfo.

MR. BAUMGARTEN: Maurice Baumgarten for the defendant [sic].

THE COURT: This has been an active file. There is an order of the Magistrate's report and recommendation filed November 9, 1995. There were objections. The objections were overruled.

Then there was another flurry of motions. This is set for trial when?

MR. WEISBERG: March 4th.

THE COURT: I guess the most significant of which has to do with the discovery on financial information and a motion for sanctions.

Was there a motion to dismiss the claim for punitive damages?

MR. BAUMGARTEN: Yes. It was part of a summary judgement motion:

THE COURT: What was the ruling?

[3] MR. BAUMGARTEN: The ruling was the issues of fact that precluded summary judgement on the merits of the Title 7 claims; precluded summary judgement and the punitive damages claims.

THE COURT: Why hasn't discovery been permitted on the financial information? What is the objection?

MR. BAUMGARTEN: The objection was that we still have the issue of the Court's subject matter jurisdiction outstanding. The defendants moved for summary judgement for lack of subject matter jurisdiction under Title 7.

The Magistrate, in his report and recommendation, stated there were issues of fact that precluded the granting of summary judgement, but that the issue of subject matter jurisdiction was [sic] still an outstanding one, and when the Court affirmed the Magistrates report, that still

leaves an issue of subject matter jurisdiction outstanding, and given the fact that it is not clear whether the Court has subject matter jurisdiction, and that an evidentiary hearing is going to have to be held to determine that, we believe that the information about Doctor Ginsberg's financial net worth, which is very sensitive information, is to released now, would be premature, and that is why we did not give the information, and that is why we have asked the Court to allow us to provide that information to the plaintiff once the issue of subject matter jurisdiction has been resolved.

We can get that information to the plaintiff in less than a day, and we will be able to stipulate that Doctor Ginsberg's net worth is a figure in excess of X.

The Court can order discovery. I feel with the Court's subject matter jurisdiction still very much up in the air, that there is no reason why plaintiffs [sic] need [sic] or [4] should have that information at this point.

MR. WEISBERG: What the defendant is raising goes to how the whole trial should be conducted, which would suggest to the Court that the record contains sufficient facts and from which this Court can conclude that Title 7 is implicated, and that we are ready to go forward, and that our suggestion to the Court would be that the case be tried on March 4 and that defendant has indicated they believe the Court, not the jury, should ultimately make the decision on the subject matter jurisdiction, and we don't quarrel with that, and how I would foresee presenting the case is that Judge Moreno did this.

I am looking at a case, Eleventh Circuit case. I have the cite and some of the briefs, but we present the case

simultaneously to the jury, and where there is certain evidence that would just go to subject matter jurisdiction. [sic] We would then just present that to the Court. I can foresee if the jury is dismissed at five o'clock, we can address it at those times, but the matter is that we have sufficient evidence put forward. The Magistrate concluded those facts permit an inference that subject matter jurisdiction has been met, and that the case should go forward.

There is no need for any delay. That is why at this point we are entitled to the financial information to [5] be able to prepare it, to make the presentation at trial.

The defendant suggests we get it someway. Midway through trial is not feasible to allow to us to effectively evaluate it and present it.

MR. BAUMGARTEN: Your Honor, the Magistrate made no such inference about the issue of whether or not the Court has subject matter jurisdiction.

He specifically found those were all subject to issues of fact as to who plaintiff's employer was. Those are all issues that are still out there. The Court does not have original jurisdiction over this claim unless at first it first determines there is subject matter jurisdiction and does not have jurisdiction over the supplemental state law claims.

The issues involving subject matter jurisdiction have nothing to do with the merits of plaintiff's claim, and as counsel for plaintiff pointed out, it is up the Court to resolve those factual issues relating to the subject matter jurisdiction before it can proceed with this case, and we

are willing to stipulate that a Magistrate be appointed to conduct an evidentiary [sic] hearing on that issue, and the parties would be bound by the magistrate's ruling, but we simply can't go forward on the merits of the claim until the Court first determines whether or not it has subject matter jurisdiction.

[6] MR. WEISBERG: Virgo versus Riviera [sic] Beach. In that case Judge Moreno tried a Title 7 claim. The issue in that case was the very issues [sic] as to whether or not it was an employer; whether corporations should be combined; whether or not there was sufficient number of employees, and at the conclusion of the trial he issued findings with respect to that, and it went to the Court of Appeals.

I think that that is the most prudent way to afford this. This case is almost three years old, and under the law, even if we think the Court has decided this was Title 7 Federal jurisdiction, then there would be an assumption that the Court would still go ahead and try the state law claims, since they have been involved with this case.

Now they are intertwined with the Federal claims. They have been with this Court for three years. The suggestion of having another trial before the trial, really would just further delay getting this case resolved.

THE COURT: Who had this case first?

MR. WEISBERG: Judge Marcus. He had it for several months.

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[11] THE COURT: Judge Bandstra heard this case on motion for summary judgement?

MR. WEISBERG: Yes.

THE COURT: I will send it back to him to resolve the issue of subject matter jurisdiction on a motion to dismiss. Any objection to that?

MR. WEISBERG: He has already.

THE COURT: It was not presented to him in that fashion. It was presented as a motion for summary judgement. It's probably very easy for him to take the next step. Let's weigh the evidence now and decide whether there is subject matter jurisdiction. All he decided was the material issues of fact. He did not decide the issue.

MR. WEISBERG: That is correct. Motion to dismiss was heard at the motion for summary judgement.

THE COURT: Let's send it back to him to complete the work.